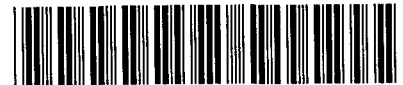


ORIGINAL



0000130948

1 OFFICE OF THE CITY ATTORNEY

GARY VERBURG, City Attorney

2 State Bar No. 005515

200 West Washington, Suite 1300

3 Phoenix, Arizona 85003-1611

Telephone (602) 262-6761

4 Fax (602) 524-7524

Email: law.civil.minute.entries@phoenix.gov

5

CYNTHIA S. CAMPBELL, State Bar No. 016874

6 Assistant City Attorney

Email: cynthia.campbell@phoenix.gov

7

Attorneys for Intervenor City of Phoenix

8

BEFORE THE ARIZONA CORPORATION COMMISSION

9

COMMISSIONERS:

10

GARY PIERCE, Chairman

11

SANDRA D. KENNEDY

12

PAUL NEWMAN

12

BOB STUMP

13

BRENDA BURNS

13

14 IN THE MATTER OF THE APPLICATION  
15 OF ARIZONA-AMERICAN WATER  
16 COMPANY, AN ARIZONA  
17 CORPORATION, FOR A DETERMINATION  
18 OF THE CURRENT FAIR VALUE OF ITS  
19 UTILITY PLANT AND PROPERTY AND  
20 FOR INCREASES IN ITS RATES AND  
21 CHARGES BASED THEREON FOR  
22 UTILITY SERVICE BY ITS  
ANTHEM/AGUA FRIA WASTEWATER  
DISTRICT, SUN CITY WASTEWATER  
DISTRICT, AND SUN CITY WEST  
WASTEWATER DISTRICT.

////

RECEIVED

2011 NOV -3 P 4:43

AZ CORP COMMISSION  
DOCKET CONTROL

Arizona Corporation Commission

DOCKETED

NOV 3 2011

DOCKETED BY

DOCKET NOS. W-01303A-09-0343  
and SW-01303A-09-0343

**CITY OF PHOENIX' RESPONSE  
TO MOTION TO EXCLUDE  
ISSUE FROM HEARING**

OFFICE OF THE CITY ATTORNEY  
GARY VERBURG, City Attorney  
200 W. WASHINGTON, SUITE 1300  
PHOENIX, ARIZONA 85003-1611

1 The City of Phoenix (City), through its City Attorney, Gary Verburg, by his Assistant,  
2 Cynthia S. Campbell, responds to the Motion to Exclude Issue from Hearing filed by  
3 Anthem Community Council (Anthem) as follows:

4 **I. BACKGROUND**

5 On June 23, 2011, the City filed its Motion to Intervene and Notice of Errors to  
6 Decision No. 72047. In that Motion, the City stated that it did not receive notice of the rate  
7 cases for water and wastewater services from Arizona American Water Company (AAWC)  
8 even though both rate cases might affect the rates charged to the City for water and  
9 wastewater services. Due to the lack of notice, the City was unable to participate in the rate  
10 making process which resulted in Decision No. 72047. In addition to the apparent lack of  
11 due process, the lack of notice to the City has already resulted in the Arizona Corporation  
12 Commission (Commission) adopting incomplete and confusing water rates related to  
13 wholesale water sales and wheeling water costs. Furthermore, in this portion of the rate  
14 hearing, the Commission may affirm a rate which may not be applicable to the City and at a  
15 minimum unduly prejudices the City's residents due to the lack of notice. The wastewater  
16 rate also is based on inaccurate revenue figures submitted by AAWC which will ultimately  
17 impact all water users of the Agua Fria/Anthem wastewater district and result in yet another  
18 urgent rate hearing to adjust rates due to the revenue shortfall known to, but not disclosed by,  
19 AAWC. The incorrect revenue figures are based in part on AAWC's assumptions of  
20 projected income from the City which AAWC knows to be inaccurate, and based in part on  
21 its breach a certain agreement between the City and AAWC, "Anthem Wholesale  
22 Water/Wastewater Service Agreement" ("Service Agreement").

1 In an attempt to inform the Commission of these miscalculations of revenue and have  
2 an opportunity to receive due process regarding the wastewater rates potentially imposed on  
3 the City, the City intervened in this matter and submitted testimony from witnesses relating  
4 both to AAWC's failure to give notice to the City, as well as information relevant to the  
5 Commission regarding the mistakes made in the wastewater rate making which will  
6 adversely affect the Agua Fria/Anthem wastewater district whether or not it is  
7 deconsolidated. While some of the issues submitted by the City with regard to rate making  
8 are related to the terms of the Service Agreement, AAWC's inaccurate projection of the  
9 volume of future water use by the City has a direct and immediate impact on AAWC's  
10 revenues which are disproportionately imposed on the residents of the City in the West  
11 Anthem area. Moreover, contrary to Anthem's assertions in its Motion, it is proper and  
12 appropriate for the City to participate in this matter, especially considering the  
13 disproportionate impact it will have on Anthem customers in the event of deconsolidation.

14 **II. ANTHEM HAS NO STANDING TO EXCLUDE THE CITY OR**  
15 **THE ISSUES RAISED BY THE CITY IN THESE PROCEEDINGS.**

16 Anthem's Motion asks the Hearing Officer to exclude the City's issues:

17 from being considered by the Commission during this phase of the above-  
18 docketed proceedings, and precluding the parties to this docket from proffering  
19 any argument or evidence . . . on the same, so that City test year billing activity  
20 and the wastewater rates established by Decision No. 72047 . . . will remain  
21 unchanged until a future Arizona-American Water Company . . . rate case.

22 Anthem has no standing to request this exclusion. The Commission granted the City the  
right to intervene in a Procedural Order issued on July 5, 2011: "[T]he City of Phoenix is  
hereby granted intervention in this proceeding on the Compliance Application in order to  
*represent its interests* on the issue of Commission consideration of stand-alone revenue

1 requirements and rate designs for the Anthem/Agua Fria Wastewater District.” (italics  
2 added). Clearly the Commission acknowledged that the City has an interest in the revenue  
3 requirements and rate designs that impact the deconsolidation. In the same Order, the  
4 Commission noted that none of the parties filed an objection to the City’s Motion to  
5 Intervene.

6 Arizona statutes and the Commission’s Rules of Practice and Procedure bar Anthem’s  
7 Motion to Exclude. A party that objects to an order of the Commission must file an  
8 application for a rehearing within 20 days from the date of the order of the Commission.  
9 Arizona Revised Statutes (A.R.S.) § 40-253; Arizona Administrative Code (A.A.C.) R14-3-  
10 111. As previously noted, the Commission’s Procedural Order granting the City’s Motion to  
11 Intervene was issued on July 5, 2011. Anthem’s Motion addresses the exact issues in the  
12 Commission’s July 5<sup>th</sup> order, and is thus untimely and should be denied for lack of standing.

13 **III. THE CITY SHOULD BE PERMITTED TO ADDRESS THE ISSUE OF**  
14 **AAWC’S APPLICATION OF THE RATE TO THE CITY’S WATER USE,**  
15 **WHICH IS AN ISSUE IN THIS PHASE OF THE CASE.**

16 In its Compliance pleading, AAWC proposed applying the newly established rate  
17 applicable only to the City by using an industry standard of applying the rate to 30% of  
18 potable water delivered. The City has an interest in the rate application method AAWC uses  
19 for wastewater services, as it provides some basis for the actual costs of wastewater service  
20 to the City. This application would provide at least the City’s customers a benefit the Agua  
21 Fria/Anthem customers receive in their “not to exceed” rate application. While it does not  
22 comply with AAWC’s requirements in the Service Agreement, the proposed rate application

1 represents AAWC's recognition that not all water delivered to the City returns as  
2 wastewater.

3 In addition to Anthem, RUCO and Staff also reject the application of the rate  
4 suggested by AAWC to the City. At a minimum, the City should be permitted to rebut the  
5 characterizations of Anthem, RUCO and Staff that AAWC's current proposal to apply the  
6 rate to 30% of the water delivered to the City is a "manipulation of the rate" or a shift of  
7 revenue to Anthem residential customers based on an alleged "renegotiation" of an  
8 agreement between the City and AAWC. As demonstrated in the following paragraph, that  
9 presumption is faulty and pejorative. Finally, the fact that Anthem objects to the  
10 methodology AAWC proposes to apply to the City, while at the same time arguing that the  
11 City should not be permitted to participate in the Commission's hearing to decide that issue,  
12 is disingenuous, inherently unfair and a further violation of the City's right to due process.

13 In its Motion, Anthem argues that the City's issues should be excluded because the  
14 rate decision and test year of 2008 predate an alleged 2011 renegotiation which resulted in  
15 changes to the Service Agreement. This argument is based on the Direct Testimony of Dan  
16 L. Neidlinger filed on August 16, 2011. Neidlinger Direct Testimony, page 3. The assertion  
17 of a 2011 renegotiation has been accepted as fact by both RUCO and Staff. However, Mr.  
18 Neidlinger provided no support for his assertion of a 2011 renegotiation. In fact, there was  
19 no renegotiation. The Service Agreement between the City and AAWC dates back to 2000,  
20 when AAWC's predecessor in interest executed the Service Agreement with a term of 99  
21 years. *See Service Agreement, page 77.* The purpose of the City's communications with  
22

1 AAWC was to urge AAWC to comply with the terms of the Service Agreement which  
2 predates this rate case.

3 In requesting that AAWC measure wastewater flow at the wastewater flume for  
4 purposes of rate application, the City was attempting to enforce the terms of its Service  
5 Agreement with AAWC. Per the terms of the Service Agreement, the parties agreed that as a  
6 prerequisite to submitting the contractual fees charged to the City to the jurisdiction of the  
7 Commission, AAWC was *required* to submit any proposed rate change based on "changes in  
8 the actual costs paid or incurred by [AAWC] with respect to providing the [wastewater]  
9 services pursuant to this Article." Service Agreement, page 47. While the City is not asking  
10 the Commission to enforce the Service Agreement, the City maintains that it will pursue its  
11 remedies to enforce the Service Agreement. Moreover, it is very relevant to the stand-alone  
12 revenue requirements and rate design that AAWC may be contractually barred from  
13 assessing a rate against the City. AAWC did not disclose this contract requirement to the  
14 Commission and cannot prevail on the position that "the actual costs paid or incurred" with  
15 regard to wastewater services for the City will support the rate or its application against  
16 100% of water delivered.

17 **IV. THE ACTUAL RATES ASSESSED AGAINST DIFFERENT TYPES OF**  
18 **CUSTOMERS AND THE BASIS FOR THOSE RATES ARE WITHIN**  
19 **THE SCOPE OF THIS PHASE OF THE PROCEEDINGS.**

20 In its Motion, Anthem states that the issues raised by the City are beyond the scope of  
21 this phase of the rate case. The City respectfully disagrees. According to Decision No.  
22 72047, the purpose of this phase of the rate case is to consider "the design and  
implementation of stand-alone revenue requirements and rate designs . . ." Decision No.

1 72047, page 121. Further, the Commission held that “the rates approved herein for the  
2 Anthem/Agua Fria Wastewater district are interim rates subject to change pursuant to a  
3 Commission determination on the above-ordered filing.” *Id.* The City asks the Commission  
4 to adjust the interim rate assessed against it as the sole member of “Other Water User”  
5 category because in addition to the issues previously noted, the rate does not consider the  
6 fact that the City serves a large percentage of *residential* customers. The City’s customers  
7 are like those of the residents of Anthem; that is, not all of the potable water delivered to  
8 homes or businesses goes back into the system for wastewater treatment. However, while  
9 the residents of the Agua Fria/Anthem wastewater district are afforded a “not to exceed” or  
10 other similar limit or concession based on the variations between the delivery of water and  
11 the flow of wastewater, the application of rate assessed against the City as suggested by  
12 Anthem, RUCO and Staff does not include similar recognition. Given that the City was  
13 deprived of the right to participate in the original rate making process, the City maintains that  
14 it would be appropriate for the Commission to consider changing the rate based on the nature  
15 and volume of the City’s water use.

16 The mistakes and direct omissions made by AAWC in proposing its water and the  
17 wastewater rates will have a significant and direct affect on the rate design for the Agua  
18 Fria/Anthem wastewater district and especially on a stand-alone Anthem wastewater district.  
19 As an example, in Decision No. 72047, the Commission set a single *wholesale* water rate  
20 applicable solely to the City of \$0.5102 per 1,000 gallons. In its Service Agreement, the City  
21 currently pays \$2.32 per 1,000 gallons for wholesale water and \$0.30 per 1,000 gallons for  
22 wheeling services. Moreover, based on the previous rate decision for water, AAWC will

1 lose \$1.81 for every 1,000 gallons of wholesale water it provides to the City based on the  
2 difference between the contractual rate and the rate established by the Commission. The  
3 wheeling rate was not addressed by the Commission, so it remains at the contractual price of  
4 \$0.30 per 1,000 gallons. The City attempted to bring these issues to the Commission in its  
5 initial Motion to Intervene, but the Commission declined to address the mistakes. Therefore,  
6 the City will abide by the Commission's decision and pay \$0.5102 per 1,000 gallons of  
7 wholesale water it purchases and \$0.30 per 1,000 gallons of the City's water wheeled  
8 through Anthem's distribution system.

9 Similarly, in the wastewater rate making, AAWC failed to present information to the  
10 Commission regarding "the actual costs paid or incurred by [AAWC] with respect to  
11 providing [wastewater] services," as required in the Service Agreement as a prerequisite to  
12 submitting a change in the contractual rate to the jurisdiction of the Commission. AAWC's  
13 actual cost to provide services solely to the City is obviously not the same as a "cost of  
14 service study," as that term of art is used to describe a review AAWC's system-wide costs  
15 and revenues. Even if they were the same, AAWC failed to conduct a system-wide cost of  
16 service study, much less a study of the actual costs Anthem pays or incurs to treat the  
17 wastewater from the City. Based on the foregoing, the contract provisions which allowed  
18 AAWC to submit a rate making application to the Commission affecting the City may not be  
19 applicable, taking the City out of the rate making altogether. This would have an immediate  
20 and significant revenue miscalculation for wastewater treatment of \$3.24 per 1,000 gallons  
21 of potable water delivered to the City, a portion of which returns as wastewater. This  
22 represents the difference between the contractual rate of \$2.32 per 1,000 gallons and the



1 Commission's rate of \$5.58. Whether the Commission takes notice of the affect of the  
2 Service Agreement, or agrees with the application of the rates, these are issues AAWC  
3 should have disclosed to the Commission in designing the rate in this matter, and represent a  
4 significant shortfall in AAWC's revenue projections.

5       The City does not inherently object to submitting to the Commission's jurisdiction to  
6 change its contractual rate as long as AAWC complies with the requirements of the contract  
7 in requesting a change from the Commission. Because AAWC has not disclosed the  
8 contractual requirements regarding AAWC's application to the Commission, the result is a  
9 proposed rate which does not consider the import of the Service Agreement. Instead,  
10 AAWC proposed a rate which saddles the City with the excess revenues it needs to operate  
11 an entire wastewater system which mostly serves the residential customers in the Agua  
12 Fria/Anthem area. The City maintains that its only interest in this case is that its residents be  
13 treated fairly and in submitting to the Commission, have the opportunity to present issues  
14 which relate to a rate established and applied to the City.

15       The City's issues are well within the scope of the current phase of this rate case and  
16 resolution of the issues may present the only way the rate base will be sustainable. The City  
17 is directly affected by the design and implementation of stand-alone revenue requirements,  
18 and deserves a right to be heard in this matter, especially when it has already been prejudiced  
19 by AAWC's lack of notice resulting in the City's inability to be heard in this matter.

20       WHEREFORE, the City of Phoenix prays that the Commission deny the Motion to  
21 Exclude Issue From Hearing filed by the Anthem Community Council. In the alternative, in  
22 the event the Commission determines that the issues presented in this particular phase of the

OFFICE OF THE CITY ATTORNEY  
GARY VERBURG, City Attorney  
200 W. WASHINGTON, SUITE 1300  
PHOENIX, ARIZONA 85003-1611

1 rate case are limited to deconsolidation without regard to rate design, the City of Phoenix  
2 prays that the Commission conduct further hearings to consider the rate applicable to the  
3 City due to the lack of notice and the likely resulting revenue shortfall to the wastewater  
4 district serving Anthem.

5 RESPECTFULLY SUBMITTED this 3<sup>d</sup> day of November, 2011.

6 GARY VERBURG, City Attorney

7 By Cynthia S. Campbell

8 CYNTHIA S. CAMPBELL

9 Assistant City Attorney

200 W. Washington, Suite 1300

Phoenix, Arizona 85003-1611

10 Original and 13 Copies of the  
11 foregoing hand delivered this  
12 3<sup>rd</sup> day of November, 2011 to:

13 Docket Control  
14 Arizona Corporation Commission  
15 1200 W. Washington  
16 Phoenix, AZ 85007

17 Administrative Law Judge  
18 Arizona Corporation Commission  
19 1200 W. Washington Street  
20 Phoenix, Arizona 85007

21 Copies of the foregoing mailed  
22 this 3<sup>rd</sup> day of November, 2011, to:

Thomas M. Broderick  
Arizona-American Water Company  
2355 W. Pinnacle Peak Road, Suite 300  
Phoenix, AZ 85027

Craig A. Marks  
10645 N. Tatum Blvd., Suite 200-676  
Phoenix, AZ 85028  
Attorney for Arizona-American  
Water Company

- 1 Sun City Grand Community Assoc.  
Palm Center
- 2 19736 N. Remington Drive  
Surprise, AZ 85374
- 3 Daniel W. Pozefsky  
Chief Counsel
- 4 Residential Utility Consumer Office  
1110 West Washington Street, Suite 220
- 5 Phoenix, AZ 85007
- 6 Steve Olea  
Utilities Division
- 7 Arizona Corporation Commission  
1200 W. Washington Street
- 8 Phoenix, AZ 85007
- 9 Maureen Scott  
Robin Mitchell
- 10 Legal Division  
Arizona Corporation Commission
- 11 1200 W. Washington Street  
Phoenix, AZ 85007
- 12 Larry Woods  
Property Owners and Residents Assoc.
- 13 13815 E. Camino Del Sol  
Sun City West, AZ 85375-4409
- 14 Bradley J. Herrema  
Robert J. Saperstein
- 15 Brownstein Hyatt Faber Schreck, LLP  
21 E. Carrillo Street
- 16 Santa Barbara, CA 83101
- 17 Greg Patterson  
Water Utility Association of Arizona
- 18 916 W. Adams, Suite 3  
Phoenix, AZ 85007
- 19 Philip H. Cook  
10122 W. Signal Butte Circle  
Sun City, AZ 85373

Judith M. Dworkin  
Roxanne S. Gallagher  
Sacks Tierney PA  
4250 N. Drinkwater Blvd., Fourth Floor  
Scottsdale, AZ 85251-3693

Lawrence V. Robertson, Jr.  
P.O. Box 1448  
Tubac, AZ 85646-1448

Jeff Crockett  
Robert Metli  
Snell & Wilmer  
One Arizona Center  
400 E. Van Buren Street  
Phoenix, AZ 85004-2202

W. R. Hansen  
12302 W. Swallow Drive  
Sun City West, AZ 85375

Andrew M. Miller, Town Attorney  
Town of Paradise Valley  
6401 E. Lincoln Drive  
Paradise Valley, AZ 85253

Desi Howe  
Anthem Golf and Country Club  
2708 W. Anthem Club Drive  
Anthem, AZ 85086

Michele Van Quathem  
Ryley Carlock & Applewhite  
1 N. Central, Suite 1200  
Phoenix, AZ 85004

Joan S. Burke  
Law Office of Joan S. Burke  
1650 N. First Avenue  
Phoenix, AZ 85003

1 Marshall Magruder  
P.O. Box 1267  
2 Tubac, AZ 85646

3 By Kathleen Badillo  
4 CSC/kb:937956v1

OFFICE OF THE CITY ATTORNEY  
GARY VERBURG, City Attorney  
200 W. WASHINGTON, SUITE 1300  
PHOENIX, ARIZONA 85003-1611

5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22